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Case Number 06-421

IN THE

Supreme Court of the United States

ALLEGRA D. HEMPHILL

Petitioner,

v.

THE PROCTER & GAMBLE COMPANY

and KIMBERLY - CLARK CORPORATION,

Respondent(s).

ON PETITION FOR REHEARING
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR REHEARING

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QUESTION PRESENTED FOR REVIEW

Is the statute Title 35 United States Code, Section 112, and more specifically, the patent law Title 35 U.S.C. §112, ¶2 relevant law in patent cases?

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption. Kimberly-Clark Corporation and The Procter & Gamble Co. are corporations and there is no other parent or publicly held company owning 10% or more of the corporation's stock. [1]

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TABLE OF CONTENTS

Page

Question Presented for Review.....i.

Parties to the Proceeding.....ii

Table of Contents iii

Table of Authorities.....iv

Letter.....1

Conclusion 8

Supreme Court Certificate 44.2 9

TABLE OF AUTHORITIES

Cases **Page**

Markman v. Westview Instruments, Inc.,
52 F3d. 967, (Fed. Cir. 1995) 979 (en banc), aff'd..... ... 3

Moba v. Diamond Automation , Inc.
325 F3d. 1306 1315 (Fed. Cir. 2003).....2

Quakenbush v. Allstate Insurance Co.,
517 US 706 716 (1996).....6

Techsearch, LLC v. Intel Corp.
286 F.3rd. 1360 (Fed. Cir. 2002 1369, 1378.....4. 5

Warner-Jenkinson Co. v. Hilton Davis Chemical Co.
520 US 17 (1997) 18, 32.....3, 5

Statutes

Title 35 United States Code, Section 112

Title 35 U.S.C. §112, ¶2, provides:

"The specification shall conclude
with one or more claims particularly pointing out
and distinctly claiming the subject matter
which the applicant regards are her invention." .....*passim*

United States Patents and Trademark Office

Hemphill, United States Letters Patent 4,557,720

CLAIM 1, Col. 6, line 1- Col. 7, line 5, provides as follows:

1. A vaginal swab comprised of

an outer housing having a closed and open end on opposing ends thereof,

said housing including an annular band defining said open end and a plurality of frangible seams that together define a pair of removable members and a pair of housing segments hingably secured to said annular band following removal of said removable members,

a swab core member having a predetermined exterior shape,

said core member having an annular base with an outer diameter equal to the inner diameter of said annular band and an adsorbent member secured to said core member, said core member being secured within said housing so that said adsorbent member is enclosed therein.

CLAIM 2, Col. 7, line 6 -Col. 8, line 10, provides as follows:

2. A vaginal swab comprising

an outer housing including an inner case member and an outer case member at least part of which is connected to and said overlies said inner case member;

a core member, at least one layer of porous material secured to said core member, and housing means for supporting and enclosing said core member, said core member being secured to said housing means, having at least two portions movable relative to one another between first and second positions for enclosing said core member when in said first position and for both exposing said core member and the said porous padding secured thereto and for forming a handle for said swab when in said second position.

REFERENCE MATERIALS

American Heritage Dictionary (3d ed. **1992**);

Dorland's Medical Dictionary (28th ed. **1994**).

Webster's New Dictionary, **(1979)**

To the Honorable Supreme Court Justice(s):

The QUESTION PRESENTED FOR REVIEW, was specifically about whether the patent law Title 35 U.S.C. §112, ¶2 is relevant law in patent cases?

On November 27, 2006, I understand the petition for writ of certiorari is denied. For clarification, does this mean the statute Title 35 U.S.C. 112, is not relevant law in a patent case?
The statute Title 35 U.S.C. §112, ¶2 reads:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as her invention.

This was relevant law when I earned, and obtained my United States Letters Patent 4,557,720 on December 10, 1985. This above law enacted by Congress was considered mandatory law in 1985. If the law is still relevant in this year of December 2006, it requires Congress enforce their own laws because it is not being applied or enforced by the federal judges in the district court of Maryland, or, in the court of appeals. My petition is reasonable:

In federal court, claims in my 1985 United States Letters Patent 4,557,720 were decided by a 1994 dictionary not available to the applicant in 1985. The 1994 dictionary was not in print in 1985. The dictionary I consulted, had to be, before 1985. The 1979 *Webster's New Collegiate Dictionary* actually available to me, as the applicant and patentee, was dated before the patent application was filed in 1982. (The Court's task [is to ascertain] the meaning of claim terms to one of ordinary skill in the art **at the time of the invention**.) *Moba v. Diamond Automation Inc.*, 325 F3d. 1306,1315 (Fed. Cir. 2003).

The lower court's 1994 dictionary as a reference provides full discretionary power which is carte blanche. [2] Broadening the claim, in this manner, requires this Court to remand the case to the court of appeals for further determinations about the materials used, or enforce the relevant law for the applicant to point to and distinctly claim the kind and/or type of materials used, through the prior art.

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The Hemphill, United States Letters Patent 4,557,720 issued in **1985** which is earlier than the court's reference.
The court's reference material was dated later in the
American Heritage Dictionary (3d ed. **1992**);
and also in *Dorland's Medical Dictionary* (28th ed. **1994**).

The federal circuit judges are rejecting the way the patent law reads. The above law reads for the court to interpret the claims 'as the applicant regards her invention' which specifically requires the applicant to point to and distinctly claim *her invention.* The lower court continues to be 'in denial' about the significant bearing the patentee has upon the invention. By misquoting the law so that it reads: 'as the court regards the invention' requires the court to be more forthcoming about the materials used in the 1994 dictionary. The Supreme Court said in *Warner-Jenkins Co. v. Hilton Davis Chemical Co.*, 520 US 17, 18 (1997): "Title 35 U.S.C. §112, ¶2 is the requirement for a patentee to specifically claim the covered invention." This is settled law. The court's minor change in the law from 'as the applicant regards her invention' to 'as the court regards the invention', is so very wrong because the district judge seeks to replenish the known prior art structure in the patent with unknown structure in a 1994 dictionary by *misrepresenting Markman* (because claim construction is a matter of law for the court to decide). *Markman v. Westview Instruments, Inc.*, 52 F3d. 967, (Fed. Cir. 1995) 979 (en banc), aff'd. reads: "Because claim construction is a matter of law, the construction given the claims is reviewed, *de novo*, on appeal". Knowingly or unknowingly, this minor change in Title 35 U.S.C. §112, ¶2 creates ambiguity in places where it did not exist before:

> Is the stick as defined by the 1994 dictionary definition, long and slender like a piece of gum, or does the court

> intend to override the PTO decision about the wooded cudgel in the prior art McNair patent? Is the term 'fairly rigid' like 70 lb. weight paper in comparison to 24 lb. weight paper; is the core member made of tag board or corrugated cardboard; can it be made of plastic? etc.

These questions must be answered by the court, because the 1994 dictionary simply does not provide the information. All of these questions were answered by the applicant in the Hemphill United States Letters Patent 4,557,720 in the United States Patent Trademark Office (PTO) in 1985. In 1985, the law in Title 35 U.S.C. §112, ¶2 meant for the applicant to show how she regards her ***invention***. It is unreasonable to overlook this law and not enforce the law, especially if the law is relevant.

The prior art structure in the United States Letters Patent 4,557,720, is, the true invention. If the court continues to reject the law and refuses to allow the applicant the opportunity to point to structure that is found in my Letters Patent 4,557, 720, then the court must be more forthcoming with the specifics about 1994 dictionary and the materials used. To date, the lower court judges have not held any discussions for an understanding. Closing the case prematurely, before applying the law, was the standard procedure in the district court of Maryland. In the fourth circuit prior art is not considered. This procedure conflicts with ninth circuit law where the court of appeals oversees prior art structure and recognizes the importance of enforcing Title 35 U.S.C. §112, ¶2: ([e]valuations of the prior art requires consideration).

Techsearch, LLC v. Intel Corp. 286 F.3rd. 1360 (Fed. Cir. 2002)1369. Clearly, the protocol in the fourth circuit does not seem fair or right. It is not the example of (the court's inherent search for the truth as the basic building by which the judicial process maintains its credibility with the fabric of our society.) *Techsearch, LLC v. Intel Corp.* 286 F.3rd. 1360 (Fed. Cir. 2002 1378.

Title 35 U.S.C. §112, ¶2 was supreme law of the land in 1985. Should this law be relevant in this year of 2006, it reopens the case. Replenishing the prior art structure in my 1985 United States Letters Patent 4,557,720 with structure in a 1994 dictionary requires more specifics about the materials used, otherwise we all face the consequence of upsetting the balances in the United States Patent and Trademark Office. In the Supreme Court, you said: ("The Federal Circuit should be extremely reluctant to upset the basic assumptions of the PTO and without substantial reason for doing so.) *Warner-Jenkins Co. v. Hilton Davis Chemical Co.*, 520 US 17, 32 (1997). Either the Supreme Court or Congress must reinforce the real purpose of the lower court is to apply the law. The law did not intend for the court to disregard the invention, simply by refusing to read the patent. Of course, patents are laborious to read, and reviewing prior art is tedious, but it must be done for the public to have a fair and complete understanding. This is reasonable.

My question is specifically about the patent law Title 35 U.S.C. §112, ¶2 being relevant. Patents are distinct, whereas, the 1994 dictionary does not specify any materials used, nor does it provide a 'unique description'. Please understand what the court has *given* in claim construction is carte blanche, as an authority *over* the PTO, and the higher should focus primarily on what the applicant knows is legally claimed, rightfully.

Congress will know whether or not the law is relevant but a federal judge in the US Court of Appeals for the Federal Circuit is trained in the law to know how to read patents. Title 35 U.S.C. §112, ¶2 is, and has always been, mandatory law in patent cases. (The federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.). *Quakenbush v. Allstate Insurance Co.*, 517 US 706 716 (1996). Remanding the case with a gentle reminder that 'appellate courts enforce the guarantees recognized and enacted by Congress' is reasonable because a federal judge never "sat" in a courtroom which explains why this case was not heard in a court of law and the patent law was not enforced in a patent case. There has been no visible sign of a district judge or judge in the court of appeals and there is no relevant law Title 35 U.S.C. §112, ¶2 applied in this case. For all we know, defense attorneys or clerks could have decided this case which is unthinkable. Clerks would not know if mandatory law in 1985 is still relevant in 2006. Neither the clerks, nor defense attorneys uphold to defend the constitution in the way a federal judge is expected to enforce the laws enacted by

Congress.[3]

As the applicant and patent owner, I know how to read my patent and I understand the prior art structure in my patent. Reviewing the structure in my patent, ***is***, to understand my true invention. Before 1982, I became fully aware the components/parts in my invention work well together. Once all portions are put together, my invention made a difference at a time when people here, in American, were experiencing Toxic Shock Syndrome. These companies needed an innovation but they did not know how to put the component parts together. Courts cannot feed into the greed of companies that don't believe they have to ask for permission from the patentee, and they do not offer to make amends. The solution to the problem is to fully expect our patents will be honored by the honorable. After all, how can we expect our patents will be respected abroad, when we show no regard for the patent system, here, at home.

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[3] I had to believe the system works. My course of action has been a matter of economics because patent attorneys do not take patent cases on a contingency basis. Court costs for an attorney to file a patent case in the district court is $300,00.00 and five million dollars on appeal. This 'going rate' is ridiculous for inventors that must pay the patent maintenance fees plus, the sacrifices made for obtaining a United States Letters Patent.

CONCLUSION

Rehearing, determines whether or not the patent law in Title 35 U.S.C. §112, ¶2 is relevant.

Respectfully submitted,

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December 21, 2006

SUPREME COURT RULE 44.2 CERTIFICATE

Please grant this petition for rehearing. It is presented in good faith and not for delay. Grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented in the petition for writ of certiorari.

Respectfully submitted,

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